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No. 06-333

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION,

Cross-Petitioner,

v.

SAN CARLOS APACHE TRIBE, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

JOE P. SPARKS
Counsel of Record
SUSAN B. MONTGOMERY
ROBYN L. INTERPRETER
SPARKS, TEHAN & RYLEY, P.C.
7503 First Street
Scottsdale, AZ 85251
(480) 949-1339

Attorneys for Cross-Respondents

204424

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RESTATED QUESTION PRESENTED

Did the Arizona Supreme Court err when it concluded that *res judicata* did not bar the United States as trustee for the San Carlos Apache Tribe, or the Apache Tribe on its own behalf, from claiming in Arizona's general stream adjudication, federal reserved, aboriginal, and other water rights to the tributaries of the Gila River, where the tributaries were not included in the geographic scope of the Amended Complaint filed by the United States in an earlier federal action, and where the consent decree resolving the prior federal action expressly adjudicated only water rights appurtenant to lands along the mainstream of the Gila River, and not the tributaries?

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I. STATEMENT OF THE CASE

The San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), incorporates here its Statement of the Case set forth in the its Petition for Certiorari, No. 06-173, at pp. 2-4, to which Phelps Dodge Corporation's ("Phelps Dodge") Conditional-Cross Petition relates.

II. STATEMENT OF THE FACTS

Phelps Dodge recites a number of purported facts in its Cross-Petition which are either irrelevant to the issue presented or are a misstatement of the underlying history of Apache Tribe and the federal *Globe Equity* litigation. These "facts" require correction pursuant to Rule 15(2) of the Rules of the Supreme Court.

In addition, Phelps Dodge's Statement of Facts ignores the fact that there has never been a trial on the merits of this case, or in *Globe Equity*,[1] from which a factual record can be adduced. Indeed, a great deal of the historical facts surrounding, *inter alia*, the entry of the *Globe Equity No. 59 Decree* ("*Decree*"), the conduct of the United States as trustee for the Apache Tribe in the *Globe Equity* litigation, and the history of Apache People and their struggle to exist on the arid lands of the San Carlos Apache Reservation ("Reservation") are disputed by the Tribe, Phelps Dodge, and the other respondents in this matter.[2]

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[1]The Federal Court in *Globe Equity* made no findings of fact or conclusions of law in the *Decree* as required by Rule 70 ½ of the Rules of Practice for the Courts of Equity of the United States, effective October 1, 1930

[2]As explained in the Apache Tribe's Petition, the preclusive effect of the *Globe Equity Decree* on the Tribe's claims to the mainstream of the Gila River in Arizona's stream adjudication was decided by the trial court on motions for summary judgment, despite the existence of numerous disputed material facts related to the Tribe's defense to *res judicata*, which challenged the adequacy of the United States' representation of the Tribe in the *Globe Equity* litigation, and thereby the existence of "privity" between the United States and the Tribe under

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It is important to understand at the outset that Phelps Dodge is using the waters of some of the tributaries of the Gila River now. Nonetheless, Phelps Dodge asks that the Apache Tribe, who has prior perfected (though not yet quantified) rights senior to any rights claimed by Phelps Dodge, never be allowed to adjudicate its own rights, even its historically irrigated rights, to the tributaries of the Gila River. If Phelps Dodge's argument were to be adopted, for a Reservation of almost 2 million acres with approximately 1.5 million acres in the Gila River drainage alone, the Apache Tribe, and the United States on its behalf, would be precluded under the *Globe Equity Decree*, from claiming water rights to **any** of the rivers and streams originating on or flowing through its Reservation, except for the San Carlos River, and the annual right under the *Decree* to divert 6,000 acre-feet of water for the irrigation of 1,000 acres of land.[3] This would defeat the purpose for which the Reservation was created and leave the Apache People unable to survive in their permanent Tribal homeland.

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the elements necessary for *res judicata*. Phelps Dodge's recitation in its Cross-Petition simply repeats many of the facts disputed by the Tribe below — "facts" which have not been proven in a trial on the merits.

[3]The Apache Tribe was decreed 7,300 acre feet of water to serve the San Carlos Apache Reservation through the San Carlos Apache Tribe Water Rights Settlement Act of 1992. P.L. 102-575, 106 Stat . *4740 et seq*. However, the water rights secured by the Settlement Act are only a small portion of the water rights claims for the Reservation, and are only in settlement of the Tribe's claims for remote areas of the Reservation to the Salt, Black and San Pedro Rivers, which can serve very little of the approximately 500,000 acres on the Reservation in those drainages, out of a total of a nearly 2 million acre Reservation. *See* Section II(C) below for full discussion of rights secured by the San Carlos Apache Tribe Water Rights Settlement Act of 1992. ASARCO Incorporated, the Gila River Indian Community, the San Carlos Irrigation and Drainage District, and others also claim all of the water from the San Carlos River which originates and joins the Gila River on the Reservation.

A. The Tributaries to the Gila River Were Not Included in the Geographic Scope of the Amended Complaint or the *Globe Equity Decree*

Phelps Dodge misstates the facts when it recites that the tributaries to the Gila River were included both in the Amended Complaint and the *Globe Equity Decree*, and therefore (according to Phelps Dodge), the *Decree* precludes the claims made by and for the Apache Tribe in Arizona's stream adjudication to the tributaries of the Gila River, except possibly the San Carlos River, under the doctrine of *res judicata*.[4] Phelps Dodge's view of the facts was expressly rejected by the Arizona Supreme Court.[5] Nevertheless, Phelps Dodge relies upon selective quotes, taken from the Amended Complaint and the *Decree* without the aid of context, to weave together a fictional account of the United States' conduct in *Globe Equity* which would seem to have placed the tributaries in issue. This account of events is simply wrong, as a plain reading of the Amended Complaint and the *Decree* quickly reveal.

1. The Amended Complaint Excluded the Tributaries from Its Geographic Scope

While it is true that the Original Complaint in *Globe Equity* included the tributaries to the Gila River within its geographic scope,[6] in the Amended Complaint, the United States deliberately removed the tributaries to narrow the proceedings and make the case more manageable and subject to resolution.[7] The adjudication of rights to water for the tributaries was left for later.

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[4]Cross-Petition at 6-16.

[5]*See* Apache Tribe Appendix to Petition for Certiorari, No. 06-173 ("Apache Tribe App.") at 19a-26a.

[6]*See* Original Complaint, Phelps Dodge Appendix to Cross-Petition, 06-333 ("P.D. App.") at 1-31.

[7]*See* Amended Complaint (P.D. App. 32-76). This was also confirmed in a letter dated December 29, 1931, from John F. Truesdell,

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A plain review of the Amended Complaint shows that the geographic scope of the Amended Complaint was repeatedly referenced as only "the Gila River" without any mention of the tributaries,[8] and that the water rights alleged in the Amended Complaint were to be satisfied in all instances from the "waters of the Gila River" or "from the Gila River."[9]

While an overwhelming number of references in the Amended Complaint make clear that the United States intended its geographic scope to encompass only the Gila River mainstream,[10] Phelps Dodge points to a single line in the Amended Complaint's prayer for relief where a reference to the tributaries appears.[11] This single sentence, viewed in the context of the entire Amended Complaint, did not place the tributaries in controversy. One need only look to Paragraph 15 of the Amended Complaint to understand that the limited reference to "tributaries" contained in the prayer for relief, was intended to include only those waters of the tributaries **after** the tributaries

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Chief Field Counsel, to John Ross, attorney for Phelps Dodge, that "diversions from the tributaries. . . . were not of such a character as to necessitate their determination," and further, "that in all events their handling should be left to the future."

[8]*See, e.g.*, Amended Complaint (P.D. App. 32-76) at ¶¶ 5, 7(b), 8, 9(b), 10, 12(a), 13, 13(b), 13(e), 13(f), 14, 14(a), 14(d), & 15 (making reference to rights claimed by the United States to the Gila River without any reference to the tributaries).

[9]*See id.*

[10]As discussed more fully at Section III(B), *infra.*, it was the practice in Arizona at the time the United States filed its Amended Complaint in Globe Equity to adjudicate conflicting water rights to individual segments of streams or sources of supply separately. Arizona did not begin to conduct a purportedly "**comprehensive**" water rights adjudication until the mid 1970s.

[11]*See* Amended Complaint (P.D. App. 75) ("That the Court, by its decree, determine the rights of the parties hereto to the waters of said river and its tributaries and the rights of said parties to divert water from said river within the area aforesaid . . .).

"have joined, the mainstream" of the Gila River (the only waters within the geographic scope of the Amended Complaint). In describing the geographic scope of the Amended Complaint, Paragraph 15 provides, in relevant part:

> **Each of the defendants . . . claims some right to divert water from the Gila River as it flows between the line 10 miles east of the parallel to the dividing line between Arizona and New Mexico**, and the confluence of the Salt River with the Gila River, **and after** the following **tributaries of the Gila River**, the San Francisco River, the San Carlos River, the San Pedro River, and the Santa Crus River, respectively, **have joined the main stream** . . . or the said defendants claim some right to store the water of said river, or of some tributary thereof, either within or above the stretch of the same as just described. . . .[12]

Furthermore, having limited the geographic scope of the Amended Complaint, the United States, as the plaintiff in the *Globe Equity* litigation, intended to limit the Amended Complaint to include only those persons or entities that claimed a right to divert from the mainstream of the Gila River, that is, those waters of the mainstem of the Gila River which flow between the line 10 miles east of the Arizona and New Mexico border, and then only after its tributaries have joined the River.[13] As explained below, those defendants with claims to any tributary were dismissed by the *Globe Equity Court* on the face of the *Decree.*

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[12]Amended Complaint at 33 (P.D. App. 74) (emphasis added).

[13]*Id.*

2. The *Globe Equity Decree* and Stipulations for Dismissal Entered by the United States Show that the Amended Complaint Did Not Include the Tributaries

As it did with the Amended Complaint, Phelps Dodge also relies on a handful of carefully selected quotes (this time from the *Globe Equity Decree*), to establish, as if fact, that the *Decree* resolved rights to the tributaries of the Gila River.[14] However, a plain reading of these quotes in the context of the entire *Globe Equity Decree* unequivocally shows that the tributaries were expressly **excluded** from the *Decree*. Where claimants to the tributaries were inadvertently named by the United States as defendants to the Amended Complaint, the United States agreed by Stipulation that their inclusion in the Amended Complaint was a mistake, and the *Globe Equity* court thereafter dismissed these claimants from the suit without prejudice.[15] In fact, Phelps Dodge fails to inform the Court that Phelps Dodge was one of the defendants claiming rights to the tributaries that had its claims dismissed from the *Globe Equity* litigation for precisely this reason.

In the Stipulation for Dismissal entered in *Globe Equity* between, *inter alia*, the United States and Phelps Dodge, dated January 29, 1932, both parties agreed that Phelps Dodge was named in the Amended Complaint "**through and by inadvertent mistake and error**; each of them as to their claims and rights [referring to Phelps Dodge and related Arizona Copper Company] being outside and beyond the territorial scope of said

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[14]P.D. Cross-Petition at 13-16.

[15]The effect of "dismissal without prejudice" is so basic that no effort by the Tribe or the Court should be required:.

> **Dismissal Without Prejudice.** Dismissal, as of a bill in equity, without prejudice to the right of the complainant to sue again on the same cause of action. The effect of the words "without prejudice" is to prevent the decree of dismissal from operating as a bar to a subsequent suit. Black's Law Dictionary, 4th ed., 556.

cause as same was and is explicitly defined and described in the Amended Complaint, herein. . . ." (Emphasis added).

The Stipulation for Dismissal goes on to provide that plaintiff United States agrees to the dismissal of Phelps Dodge, Morenci Water Company and various others because "the **claimants or owners of rights of diversion and/or use of water from the tributaries of the Gila River as distinguished from the main stream**, and were made parties defendant herein through inadvertence and mistake. . . ." (Emphasis added). The Stipulation also makes clear that the dismissal is without prejudice as to any of the rights of any of the parties:

> NOW THEREFORE, in consideration of and subject to the conditions named in the premises, it is hereby mutually stipulated and agreed that the cause and the amended complaint herein shall be dismissed, **without prejudice** as above set out, as to defendants Phelps Dodge Corporation and Arizona Copper Company, and each of these; such dismissal to be accomplished by way of a motion or application by plaintiff, in due course and prior to the entry of the decree herein, for an order to that end, made upon due notice to the parties who should be charged therewith; it being understood that plaintiff. . . shall move for a dismissal as to the Morenci Water Company and said other claimants or owners of rights to water **upon the tributaries** of the Gila River; **all to the end that said Phelps Dodge Corporation and Arizona Copper Company, together with defendants last referred to, shall be as though they never had been named or made parties defendant herein**." (Emphasis added).

The dismissal of Phelps Dodge[16] and other claimants on the tributaries is expressly confirmed at Article III of the *Decree*, which contains the only reference in the *Globe Equity Decree* to the tributaries of the Gila River except as describing the locations of measuring guages. Article III lists the names of numerous defendants (including Phelps Dodge) that were dismissed from the suit without prejudice because they were named in the Amended Complaint by "inadvertence, mistake and error", in light of the fact that their claims were "outside the scope" of the suit. Article III provides, in pertinent part:

> [T]hat said defendants and each of them had been **named in this action and amended complaint, as parties defendant herein, through and by inadvertance, mistake and error**, and that their claims and rights, if any, were and are **outside the scope of said suit as same was and is outlined and defined in the amended complaint** herein, and that they and each of them should be dismissed and eliminated from said cause, although some of them had filed their answers setting up their claims and rights to the use of certain waters from some of the **tributaries** of the Gila River, and said answers were filed through mistake and a misunderstanding as to the scope of said cause * * * * **said action and dismissal should be without prejudice to said defendants** and each of them **and/or to any of the other parties in this cause**, or to any claim or rights to the use of water which said defendants, or any of them, or **said other parties or any of them**, now or hereafter may have, against the other or others, **and**

[16]Phelps Dodge avoids any discussion of this Stipulation for Dismissal in its Cross-Petition. This is perhaps because Phelps Dodge knows it is judicially estopped from arguing here that the Amended Complaint encompassed the tributaries, as this is in direct contravention to Phelps Dodge's previous position before the *Globe Equity* court as entered in the Stipulation for Dismissal. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); §§ 134.30 (3d ed.).

> **that said defendants, and each of them, should be left as though they never had been named or made parties defendant herein. . . .**[17]

Article V of the *Decree* sets forth the Schedule and Rights of Priorities, also called the "Priority Schedule" for the *Decree*, and provides "that **the Gila River is the stream** from which the water called for under each of said rights [defined in the Schedule of Rights and Priorities] is and may be diverted. . . ."[18] Article V also makes clear "that rights to divert the **waters of the Gila River** are decreed to various canal companies and are set down under their names in the Priority Schedule as of various dates of priority . . . ."[19]

In addition, all of the points of diversion and all of the lands for which rights were decreed in *Globe Equity* were along the mainstream of the Gila River.[20] This is made clear in the Schedule of Rights and Priorities and at numerous other places in the *Decree*.[21] The *Decree* provides for no diversions on the

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[17]*See* Article III, *Decree*, Apache Tribe Supplemental Appendix to Petition for Certiorari, No. 06-173 ("Supp. App") at 121.

[18]Article V, *Decree* (Supp. App. 124) (emphasis added).

[19]Article V, *Decree* (Supp. App. 125) (emphasis added).

[20]Phelps Dodge uncorrectly relies upon references to the locations of guages near the confluence of a tributary with the Gila River mainstream to argue that the tributaries to the Gila River were included in the *Decree*. As the Arizona Supreme Court correctly recognized in its opinion below, the gauge on the San Carlos River is for measurement only. So is the gauge on the San Francisco River. This in no way demonstrates that the tributaries were included in the *Decree*.

[21]*See, e.g.*, Article V, *Decree* (Supp. App. 126-197); Article VIII (Supp. App. 218) ("That the diversions of water from the Gila River by the so-called upper valley defendants (parties defendant to whom rights to divert water from the Gila River at points above the San Carlos Reservation are decreed herein) . . ."); Article VI (Supp. App. 198) ("The right, on behalf of the Apache and other Indians on the San Carlos Reservation . . . to divert 6,000 acre feet of the waters of the Gila River . . . from the natural flow of said river at diversion points on said river

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tributaries to the Gila River and no water is decreed for lands appurtenant to any tributaries. This is further confirmed by Article XIII, which provides that the *Decree* is only binding upon "the parties herein" and only to claims to the "waters of the Gila River."[22]

B. The United States Had a Strong Case for the Apache Tribe at the Time of the *Decree*, But Grossly Failed to Investigate, Prepare, and Press these Tribal Water Rights Claims In *Globe Equity*

Phelps Dodge also mischaracterizes the facts related to the United States' supposed "rationale" behind its decision to secure only a nominal right to the entire Gila River mainstream for the Apache Tribe.[23] While this discussion is irrelevant to Phelps Dodge's Cross-Petition regarding the **tributaries** of the Gila River, Phelps Dodge's misstatement of the facts on this matter requires correction.

Phelps Dodge's version of events relies upon a few rare references "cherry picked" from the thousands of pages of historical documents surrounding the negotiations leading up to the *Globe Equity Decree* in order to infer that the United States had a "weak case" for the Apache Tribe in *Globe Equity*, and thus, it had little choice but to settle in the *Decree* to a nominal right for the Apache Tribe on the mainstream of only 6,000 acre-feet for the annual irrigation of 1,000 acres of land. This statement, slipped into Phelps Dodge's Cross-Petition as "fact", goes to the very heart of the Apache Tribe's Petition for Certiorari to this Court, and the Tribe's cornerstone argument,

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within said Reservation . . . for the reclamation and irrigation of 1000 acres of irrigable lands within said reservation (or in part or wholly within the valley of the Gila River above the eastern boundary of said Reservation, if lands are there acquired by the United States for that purpose) . . .") (parenthetical in original).

[22]Article XIII, *Decree* (Supp. App. 225).

[23]P.D. Cross-Petition at 10-13.

that the United States either did not intend to adjudicate all of the rights to the mainstream to fulfill the purposes for the Apache Reservation, or so grossly and inadequately represented the Tribe in *Globe Equity* as to destroy any vestige of "privity" between the United States and the Tribe, and thereby, to preclude the application of *res judicata* to the Tribe's federal reserved, aboriginal, and other water rights claims to the mainstream of the Gila River. Phelps Dodge has not proven these "facts" at a trial on the merits, and this position is controverted by the overwhelming facts in the historical documents referenced by the Apache Tribe below.[24]

The United States actually had a **strong case** for substantial water rights to the Gila for the Apache Tribe, but the Secretary of Interior ("Secretary") and the attorneys for the United States failed to fully investigate and prepare the Tribe's claims prior to the filing of the Amended Complaint, and failed to pursue these claims in *Globe Equity*, despite clear knowledge of the United States that the Apaches had existing rights to water from historically irrigated land, and the Tribe had substantial rights to the Gila River to fulfill the purposes of the Reservation under the standard established in *Winters v. United States*, 207 U.S. 564, 565 (1908).

To the extent Phelps Dodge alleges that the Tribe had a "weak case", this was not based on the facts or the law at the time of the *Globe Equity* proceedings, but rather was due to the United States' complete disregard of its own records regarding the Apache Tribe and its fiduciary responsibilities to the Tribe in favor of an all out effort to secure water rights for the benefit of the United States' own project, the San Carlos Irrigation Project ("SCIP"),[25] and to

[24]While it is not appropriate at this time to fully brief the facts set forth in the historical documents, in order to correct the misstatements contained in Phelps Dodge's Cross-Petition, the Tribe provides the Court with a brief reference to the historical documents as necessary to meet the requirements of Rule 15(2) of the Rules of this Court.

[25]As a result of various government surveys and reports, including the Report of the Department of Interior Indian Service dated November

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protect the non-Indian farmers upstream from the Apache Reservation from the "menace" of the Apache Tribe's priority.[26]

The Apaches have a long history of cultivating lands along rivers and streams throughout their aboriginal homeland, and once confined to the Reservation, the Apaches began relatively extensive farming operations along the Gila River.[27] With the tools provided by the government, the brush along the Gila River was cleared, ditches were dug, crops were planted and the Apaches put substantial lands along the Gila under cultivation.[28] By 1890, the Apache were successfully farming 8,600 acres along the Gila River.[29]

As explained above, representatives of the United States, including Truesdell, **knew** that under *Winters*, a history of irrigation was not required for the United States to claim substantial water rights for the Tribe in order to fulfill the purpose of the Reservation as a "permanent home and abiding place"

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1, 1915, also known as the Olberg Report", Truesdell and other attorneys for the United States knew that the Apaches had been irrigating from the Gila River in the past, and they also understood that *Winters* did not require an irrigation history to establish federal reserved water rights. Under Winters, the United States was not required to adjudicate rights for the Apache Reservation, and water appurtement to the Reservation could be used as needed to fulfill the purposes of the Reservation as a "permanent home and abiding place" for the Apache Tribe.

[26]In a Letter from then Assistant Chief Counsel for the United States, dated May 22, 1934, it was advised, "In the case of the Apache 1,000 acres...the Decree embodies a plan whereby the upper valley lands may get rid of the menace of this right . . . ."

[27]The Apache Tribe's history of farming in its aboriginal lands has been document in many government reports and surveys as well as in other documents found in the historical documents and scholarly works. *See, e.g., Persistence and Change in Western Apache Culture*, 1980 Report for the San Carlos Apache Tribe, Keith H. Basso, Ph.D. (University of Arizona) ("Basso Report").

[28]*Id.*

[29]*Id.*

for the Apache Tribe.[30] It is simply a misstatement of the facts and law for Phelps Dodge to infer to the contrary in its Cross-Petition.

C. Phelps Dodge Misstates the Water Rights Secured for the Apache Tribe Under the San Carlos Apache Water Rights Settlement Act of 1992

Although the San Carlos Settlement is not material to whether or not the *Decree* precludes the Apache Tribe's claims to the tributaries of the Gila River, or to the mainstream of the Gila River,[31] the misstatements of Phelps Dodge which infer that the Apache Tribe now has abundant water rights to provide for the permanent Tribal homeland of the Tribe as a result of the San Carlos Settlement must be corrected here.

Phelps Dodge misleadingly states that the San Carlos Apache Water Rights Settlement Act of 1992, P.L. 102-575, "gives" the Tribe 76,445 acre feet of water per year,[32] as well as "the ability to store water in the San Carlos Reservoir, money for capital projects, and rights to groundwater on the Reservation."[33] Phelps Dodge misstates the components of the

[30]The Apaches' adaptation to farming along the Gila River once the Reservation was established and the need for water to sustain the new methods of farming is particularly the situation that *Winters* was addressing when the court stated "[i]t was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless." *Winters*, 207 U.S. at 576.

[31]Few would disagree that the question of whether the *Decree* can be asserted as *res judicata* against the Tribe's claims must be answered based upon the historical and legal framework that existed at the time of the *Decree*, not based upon circumstances which arose later in time, such as the San Carlos Settlement.

[32]Phelps Dodge incorrectly calculates the waters confirmed to the Tribe under the San Carlos Water Settlement Act. The correct total amount is 71,445 acre-feet per year.

[33]P.D. Cross-Petition at 7-8, n.12.

San Carlos Settlement Act, and fails to explain the true nature of this water right and the CAP contract rights.

The San Carlos Settlement Act confirmed a settlement of certain claims by and for the Apache Tribe to the Black, Salt, and San Pedro River drainages. The Black and Salt Rivers are located on the extreme northern boundary of the Tribe's Reservation. The San Pedro River is located to the extreme southwest of the Reservation, and only a small portion of the Reservation is within this drainage. In total, only approximately 500,000 acres of the Tribe's approximately 2 million acre Reservation are within the Salt, Black and San Pedro River drainages. Additionally, none of the Tribe's Members reside in these drainages, as these areas are generally at high altitudes and are remote, without electricity, and largely undeveloped.

The San Carlos Settlement confirmed, *inter alia*, (1) 7,300 acre-feet of water decreed from the Black and Salt River; (2) 64,145 acre-feet of Central Arizona Project (CAP) contract water that can only be leased or used on the Reservation by exchange with a downstream water user or stored in San Carlos Reservoir; and (3) the right to groundwater and tributaries on the Reservation. For this water, the Tribe agreed to waive its claims to the Salt, Black and San Pedro River drainages.

Nonetheless, the Tribe's ability to use this water to serve its permanent Tribal homeland is extremely difficult and costly. For instance, the 7,300 acre-feet of Black and Salt River "wet" water would have to be pumped out of Black and Salt River Canyons, and then uphill before it could flow the 70 miles to the Gila River in order to serve the main population centers and best farmlands of the Reservation, which are located in the Gila River drainage. Due to objections by parties in *Globe Equity* over the method of accounting for the use of the CAP water, the costs to the Tribe, and the extensive requirements imposed by federal laws such as the Endangered Species Act, in recent years, none of the CAP water has been able to be used on the Reservation, except for approximately 6,800 acre-feet of CAP

water that was stored in San Carlos Lake in 2002, which will soon be completely evaporated.[34]

While the San Carlos Settlement is a significant achievement for the Apache Tribe and confirms a modest water supply for the Reservation to irrigate some of the approximately 500,000 acres of Reservation land located in the Salt, Black and San Pedro River drainages, the Settlement does not obviate the desperate need for the Tribe to realize the full measure of its water rights for the major portion of the Apache Reservation (approximately 1.5 million acres) located in the Gila River drainage where all of the towns, communities, and most of the farmlands of the Tribe are located.

III. REASONS FOR DENYING THE CROSS-PETITION

The issue presented in Phelps Dodge's Cross-Petition was properly decided by the Arizona Supreme Court, and Phelps Dodge has failed to provide any compelling reasons for this Court's review. The Cross-Petition should be denied.

A. The Arizona Supreme Court's Holding on the Tributaries Does not Conflict with Any Relevant Decisions of this Court

Phelps Dodge strains to compare the issues and circumstances in this case with the legal and factual issues addressed by the Court in *Nevada v. United States*, 463 U.S. 110 (1983) and *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), urging that "just as the Tribe in *Nevada* was barred from seeking fishery rights to Pyramid Lake and just as the tribes in *Arizona II* were barred from seeking additional irrigation rights for the omitted lands, the [Apache] Tribe here should be barred from seeking additional rights to the tributaries of the Gila River."[35]

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[34]Phelps Dodge's subtle suggestion that the Tribe's right to store water in San Carlos Reservoir somehow makes the issues presently before the Court less important is unsupported in reality. Only very costly CAP water may be stored by the Tribe in the Reservoir, and even then it is the first water to spill when the Reservoir fills up.

[35]P.D. Cross-Petition at 19.

Phelps Dodge fails to explain, however, that both *Nevada* and *Arizona II* involved the mainstream and **tributaries** of the Colorado and Truckee Rivers, while (as explained above) the tributaries to the Gila River were expressly excluded from the geographic scope of the Amended Complaint and in the *Globe Equity Decree*, and the *Decree* expressly and unequivocally confirmed this fact, reserving all claims to the tributaries for adjudication at a later date, including for the United States on behalf of the Apache Tribe.[36]

The Truckee River and its tributaries were expressly adjudicated as part of the "*Orr Ditch*" litigation which began in 1913, when the United States sued to adjudicate the Truckee River and its tributaries for the benefit of the Pyramid Lake Indian Reservation and the United States' planned Newlands Reclamation Project. The *Orr Ditch* litigation was resolved 31 years later by entry of a consent decree known as the *Orr Ditch Decree*. It was the United States' subsequent attempt to obtain **additional** claims from the **Truckee River** for a Tribal fishery for the Pyramid Lake Paiute Tribe which resulted in this Court's decision in *Nevada*, wherein the Court ruled, *inter alia*, that the Government, having successfully made **substantial** claims to

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[36]In an interesting "variation on the theme, Phelps Dodge insists that the United States failed to preserve claims to the tributaries for the Apache Tribe because it did not expressly dismiss the Tribe's claims to the tributaries prior to the entry of the *Decree*, as it did for Phelps Dodge and others. This argument assumes, of course, that the tributaries were included in the scope of the Amended Complaint in the first place, which they were not, and it ignores the fact that the United States, as the **plaintiff** in the action, was entitled to determine the geographic scope of the Amended Complaint. Because it did not include the tributaries in this scope, it had no need to "dismiss" its own claims to the tributaries for the Apache Tribe, as they were not implicated by the Amended Complaint. In contrast, Phelps Dodge and others were inadvertently named in the *Decree*, though they only had claims to the tributaries. The United States realized this mistake, and the claims of these persons and entities on the tributaries were dismissed without prejudice as to any party, including the United States, to adjudicate their claims at a later time.

the Truckee River **and its tributaries** in the *Orr Ditch* litigation for the Pyramid Lake Paiute Tribe,[37] could not later make additional claims to this **same source of water** for purposes of a Tribal fishery.[38]

It is important to understand that the *Orr Ditch* litigation was "no garden variety quiet title action",[39] but rather involved an adjudication of all claims to the Truckee River system and source, including all of the tributaries to the Truckee from the High Sierras to Lake Tahoe, and then from Lake Tahoe all the way down to the Reno, Nevada, and ultimately terminating in Pyramid Lake.[40] This is made clear by the United States in their amended complaint in *Orr Ditch*, where the United States expressly **included** both the Truckee River and all of its tributaries:

> Until the several rights of the various claimants parties hereto, including the United States, **to the use of the waters flowing in said river and its said**

[37]While the water rights originally confirmed for the Pyramid Lake Indian Reservation in *Orr Ditch* represented a significant amount of water, in contrast, the United States secured in *Globe Equity* (for the 1.5 million acres on the Gila River drainage on the Apache Reservation) an annual right to 6,000 acre-feet of water from the Gila mainstream for the irrigation of 1,000 acres of land, and then agreed in the *Decree*, that even this nominal right could be sold to the non-Indians in the Upper Valleys for the benefit of the United States' own project, the SCIP.

[38]*See also* P.D. Cross-Petition at 19, explaining that the District Court in Nevada "'held that neither the United States nor the tribe can litigate several different **types** of water use claims, all arising under the Winters doctrine and all designed for the **same water source**. . . .'" Of course the claims to the tributaries of the Gila River being made in Arizona's stream adjudication are not all designed from the "same water source" adjudicated in *Globe Equity*, but rather are from different sources, namely, the tributaries.

[39]*Nevada*, 463 U.S. at 143 (quoting *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1308 (9th Cir. 1981) (internal quotation marks omitted).

[40]*Id.* at 114.

> **tributaries** in Nevada or used in Nevada have been settled, the extent, nature, and order in time of each right to divert said waters from said river **and its tributaries** has been judicially determined the United States cannot properly protect its rights in and to the said waters. . . .[41]

Similarly, under the final terms of the *Orr Ditch Decree*, all parties were permanently and **expressly** enjoined from claiming water rights to the waters of the Truckee River **or its tributaries**:

> **The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named**, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, **are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries**, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree. . . .[42]

Thus, while Phelps Dodge makes much of this Court's application of *res judicata* in *Nevada* to bar the United States' additional claims to the Truckee River for a Tribal fishery, Phelps Dodge ignores the crucial distinction between *Orr Ditch* and *Globe Equity*, namely, the express inclusion of the tributaries in

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[41] *Id.* at 131-32 (internal quotation marks omitted) (emphasis added).

[42] *Id.* at 132 (internal quotation marks omitted) (emphasis added). Compare this language to the continuing injunction found at Article XIII of the *Globe Equity Decree*, which provides that ". . . each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way **with the waters of the Gila River** or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said **waters of the Gila River** or any part thereof . . . ." *Decree* at 113 (Supp. App. 225).

Orr Ditch and the express exclusion of the tributaries in *Globe Equity*. In this regard, Phelps Dodge also appears to deliberately confuse the federal reserved, aboriginal and other water rights claims being made by and for the Apache Tribe to the **tributaries** of the Gila River in Arizona's stream adjudication (tributaries which were excluded from the geographic scope of the *Globe Equity Decree*), with the **additional claims** for fisheries made by the United States for the Pyramid Lake Paiute Tribe **in the same case** and to **the same river system and source** (the Truckee River and its tributaries) which were adjudicated in *Orr Ditch*.

In a similar fashion, Phelps Dodge points to this Court's decision in *Arizona II*, where the Court held that the various tribes could not obtain additional water rights for "omitted lands" on the Colorado River, where the water rights to the Colorado River and certain of its tributaries (excepting the Gila River) had been previously confirmed in *Arizona v. California*, 373 U.S. 546, 600 (1963) ("*Arizona I*"), and the United States had secured hundreds of thousands of acre feet of water rights for the tribes.[43] Again, Phelps Dodge deliberately ignores the critical distinction that the tributaries were expressly **included** within the geographic scope of *Arizona I*, and in the subsequent decree entered at *Arizona v. California*, 376 U.S. 340 (1964),[44] while

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[43]*See Arizona II*, 460 U.S. at 617 (observing that the Indians "as represented by the United States, won what can best be described only as a complete victory."). Unlike the record in *Arizona II*, it simply cannot be said with a straight face that the United States won even a minor victory in *Globe Equity* for the Apache Tribe for its claims to the mainstream of the Gila River.

[44]*See, e.g., Arizona I*, 373 U.S. at 550 ("the basic controversy in this case is over how much water each State has a legal right to use out of the waters of the Colorado river and its tributaries."); *Id.* at 595 ("In these proceedings the United States has asserted claims to waters in the main river and in some of the tributaries, for use on Indian

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the tributaries to the Gila River were **not included** in the Amended Complaint or the *Globe Equity Decree*.

In short, Phelps Dodge's heavy reliance on the Court's discussions in *Nevada* and *Arizona II* regarding *res judicata* is misplaced, and the Arizona Supreme Court's decision below, which confirmed that neither the Apache Tribe, nor the United States as trustee for the Tribe, are precluded from claiming water rights to the tributaries of the Gila River, is not in conflict with these or any other rulings of the Court. Phelps Dodge's Cross-Petition should be denied.

B. The United States Was Not Required to Include the Tributaries in the Scope of the Amended Complaint, and Its Decision to Exclude the Tributaries Does Not Now Preclude the United States or the Tribe From Making Claims to the Tributaries in Arizona's Stream Adjudication

As discussed above, the *Globe Equity* proceeding was expressly limited in scope and effect to only the mainstream of the Gila River from a point ten miles east from the Arizona/ New Mexico border to a point 100 yards upstream of the confluence of the Gila and Salt Rivers. The *Decree* does not quantify a single right that does not draw its water from the mainstream of the Gila River within this defined geographic scope.

Phelps Dodge insists, however, that the United States's decision to limit the geographic scope of the Amended Complaint to the Gila River mainstream was improper "claim splitting" because (according to Phelps Dodge) "the waters of the tributaries are a part of the waters of the mainstream of the

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(Cont'd)

Reservations. . . ."); *see also Decree in Arizona v. California*, 376 U.S. at 341 (defining "tributaries" to mean "all stream systems the waters of which naturally drain into the mainstream of the Colorado River below Lee Ferry . . ."); *Id.* at 352 (referencing specific diversions rights to the mainstream and named tributaries on the Colorado River).

Gila River when they join the Gila River" making the tributaries the "same source" of water, to which the United States was presumably obligated to litigate all of its claims or face the consequences of *res judicata*.[45] Phelps Dodge's novel presentation of *res judicata* was neither the law nor the practice in Arizona at the time the Amended Complaint was filed, or when the *Decree* was entered. In addition, if adopted, Phelps Dodge's application of *res judicata* would have serious consequences for parties and their successors in interest who participated in the numerous historical piecemeal adjudications and decrees entered on segments of rivers and streams throughout Arizona.

Arizona's water history is replete with adjudications and lawsuits involving contests between conflicting water rights on limited and defined reaches of rivers and streams, including in the Gila River System and Source. These seemingly isolated, non-comprehensive adjudications to a particular "stream or supply" were the norm under Arizona law and the practice at the time of the *Globe Equity Decree*,[46] and continued to be the norm until Arizona undertook a purportedly comprehensive adjudication of water rights under the amended Arizona general adjudication statutes adopted in 1979 and thereafter, and this Court's decision decision on the McCarran Amendment, 43 U.S.C. § 666, in *Arizona v. San Carlos*, 463 U.S. 545 (1983).

This historical approach to resolving competing water rights claims to limited stretches of streams in Arizona resulted in the entry of a number of water rights decrees involving defined segments of streams and/or sources of supply in Arizona,

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[45]P.D. Cross-Petition at 20-21.

[46]*See, e.g.* Arizona Code, 1939, §§ 75-114 through 75-127 (providing for separate and piecemeal adjudications of one or more conflicting rights to divert from a particular stream or supply by the state water commissioner, which were then filed with the superior court and, if contested, proceeded upon "like a suit in equity" and upon conclusion, subject to the entry of a written decree or judgment).

including, *inter alia*, the *Kent Decree*, *Hance v. Arnold*, *Haggard Decree*, *Benson-Allison Decree*, *Ling Decree*, *Lockwood Decree*, *Doan Decree*, *Jenkes Decree*, *Shute Decree*, *San Pedro Decision*, and court decisions such as *Clifford v. Larrieu*, *Hill v. Lenerman*, *Dyke v. Caldwell*, *Miller v. Douglas*, *Boquillas Land and Cattle Company v. Saint David Cooperative Comm. and Dev. Assoc.*, *Wolf v. Turner*, *Pyeatt v. Huachuca Queen Mining Co.*, *Salt River Valley Water Users Assoc. v. Lee*, *Lee v. Lee*, and *Clarkson and Clarkson v. Wilcox*.

It would be nothing short of a catastrophic state of affairs in Arizona, if, as Phelps Dodge argues under its "single source theory", the purported failure of these decrees and decisions to include in their scope each and every upstream tributary, now barred under principles of *res judicata*, parties to these actions (and their successors in interest) from asserting or proving their claims to the upstream tributaries in Arizona's stream adjudication. This, of course, was not the state of the law at the time the above listed decrees or the *Globe Equity Decree* were entered.[47] Phelps Dodge's revisionist application of relatively new principles of law to the historical entry of past water rights decrees, such as the *Globe Equity Decree*, is without basis in the law or common sense, and should be rejected.

C. Parties to Consent Decrees May Agree to "Split" Their Claims, And the Court May Determine to Preserve Certain Claims for a Subsequent Action

The *Globe Equity Decree* is a consent decree entered by the *Globe Equity* court to resolve certain claims among certain parties. Consent decrees do not bar subsequent litigation, even on the same transactional facts, when the settlement agreements

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[47]*See also* Notes to Decisions, Arizona Code Annotated, 1939, § 75-127 (explaining in reference to the reopening of water rights decrees, that [a] decree is res judicata between the parties as to the issues only and not as to the rights of the actual parties of which no issue was made . . ." and observing that "[m]atters not adjudicated by the decree, or arising subsequent thereto . . . may be sought in an independent proceeding.").

which provide the basis for such decrees, are narrowly tailored by the parties, as is the case with the *Decree*.[48] In this respect, even under current standards of law applying *res judicata*, consent decrees are treated differently in that *res judicata* only applies to the subject matter upon which the parties finally agree. It does not apply to what they could, might, or should have litigated. *See Arizona v. California*, 530 U.S. 392, 395-396 (2000).[49]

Thus, in *Globe Equity*, the claims filed against defendants on the tributaries by inadvertence and mistake were later dismissed **without prejudice** by stipulation, and the *Decree* expressly and unequivocally retained and preserved the claims and defenses to the tributaries for **all** parties, including the United States for the Apache Tribe. *See Semetek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Lewis v. Riebe Enterprises, Inc.*, 170 Ariz. 384, 395; 825 P.2d 5, 7 (1992). This is made clear by express order of the *Globe Equity Court* in the *Decree* at Article III, which provides in pertinent part, that:

> **[S]aid action and dismissal should be without prejudice to said defendants** and each of them **and/or to any of the other parties in this cause**, or **to any claim or rights to the use of water which said defendants**, or any of them, **or said other parties or any of them, now or hereafter may have**, against the other or others, **and that said defendants, and each of them, should be left as though they never**

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[48]Given the very different factual issues surrounding the claims to the tributaries, as well as the distinct physical features of the tributaries, the Apache Tribe does not agree that claims to the tributaries arise out of the same transactional nucleus of facts as claims to the mainstream of the Gila River. *See Restatement (Second) Judgments*, § 24; *Hells Canyon Preservation Council v. U.S. Forest Service*, 403 F.3d 683 (9th Cir. 2005).

[49]*See also Moore's Federal Practice*, Volume 18, § 131.30 (3)(a) & (c)(ii).

> **had been named or made parties defendant herein. . . .**[50]

Sections 26(1)(a) and (b) of the *Restatement (Second) Judgments* provide:

> When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendants:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;

Both Sections 26(1)(a) and (b) apply to preclude the application of *res judicata* to the tributaries in this case. As noted already, the defendants agreed with the United States that the geographic scope of the *Globe Equity* litigation was limited to the adjudication of water rights to the mainstream of the Gila River only, they stipulated to this fact, and agreed to be dismissed **without** prejudice. The *Globe Equity* court resolved the litigation surrounding the Amended Complaint through entry of a consent *Decree* which acknowledged such stipulations, and dismissed the tributary claims without prejudice as to any parties' rights or claims, including the United States' claims for the Apache Tribe.[51]

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[50]*See* Article III, *Decree* (Supp. App. 121) (emphasis added).

[51]*See also* Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 18 (2002), § 4413, at 314, (explaining that an order, judgment, or decree that specifies that certain claims are preserved for future litigation, even if they are part of the "same cause of action" under a "transactional nucleus of facts" analysis, does **not** operate to bar such claims under the doctrine of res judicata); see also § 26(1)(b) of the *Restatement (Second) Judgments; and Venuto v. Witco Corp.*, 117 F.3d 754, 758-761 (3rd Cir. 1997).

Moreover, even in instances where stipulations for dismissal by plaintiffs are silent as to whether the dismissal is with or without prejudice, such a dismissal is normally deemed to be "without prejudice."[52] Of course, as explained above, the *Decree* was not silent on this point.

Phelps Dodge insists that *May v. Parker-Abbot Transfer and Storage, Inc.* ("*Parker-Abbot*"), 899 F.2d 1007 (10th Cir. 1990), requires that where parties agree to preserve specific claims for future litigation, such an agreement to split-claims must be "express and clear."[53] The legal propositions contained in this case are unremarkable, and offer nothing to upset the Apache Tribe's arguments for the tributaries here.

The intent of the parties to exclude the tributaries from the geographic scope of *Globe Equity* was "express and clear" as evidenced by the Amended Complaint, the Stipulation and Orders of Dismissal, and the *Decree*. Moreover, in *Parker-Abbot*, the parties entered into a settlement agreement approved by the court which did **not** reserve any claims of the parties, and the court dismissed the action with **prejudice**. The opposite was true in *Globe Equity*.[54]

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[52]*See* Rule 41(b) Federal Rules of Civil Procedure; *see also Moore's Federal Practice*, Volume 18, § 131.30 (3)(b)(1), which provides:

> Under the Federal Rules of Civil, a plaintiff may dismiss any action by notice prior to service of an answer or motion for summary judgment by the adverse party, and thereafter by stipulation signed by all of the parties who have appeared in the action. Unless otherwise stated in the notice of stipulation, the dismissal will not bar a subsequent action on the same claim B it is deemed "without prejudice."

[53]P.D. Cross-Petition at 21-22.

[54]It is also significant that the cases cited by Phelps Dodge on this topic do not involve water rights claims for Indian Tribes. If there remains any ambiguity at all from a plain reading of the Amended Complaint, the Stipulations of Dismissal, and the *Globe Equity Decree* as to whether or not the United States excluded the tributaries from the scope of its (Cont'd)

For many of these same reasons, Phelps Dodge's reliance on the Ninth Circuit's decision in *California v. Randtron*, 268 F.3d 891 (9th Cir. 2001), as amended by 284 F.3d 969, is similarly misplaced. In *Randtron*, the City of Lodi, California, brought suit against, *inter alia*, Randtron Corporation for soil and groundwater contamination, under a variety of federal and state environmental laws. Eventually, a settlement was reached between Randtron and the City of Lodi. However, in the consent decree entered by the District Court, Lodi's claims against Randtron were released only to the extent those claims were covered by two named insurance policies, known to be in existence at the time of the suit. The consent decree said nothing about any claims for contribution Randtron might have against the City of Lodi arising out of the contamination event.

On appeal from a subsequent action, the Ninth Circuit concluded that the consent decree **did not** bar Lodi from asserting the same claims against Randtron in the subsequent suit, to the extent it was determined Randtron possessed other insurance assets. The Ninth Circuit went on to conclude, however, that as to Randtron's new cross-claim for contribution

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action and/or expressly reserved the right to adjudicate its claims to the tributaries later in time, such ambiguity must be resolved in favor of preserving the Apache Tribes claims. This is required under the canons of construction applicable in Indian law — cannons which are rooted in the "unique trust relationship between the United States and the Indians" *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 247 (1985); *see also Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). These canons require that treaties and other agreements purporting to affect Indian Tribes must be liberally construed most strongly in favor of the Indians; ambiguous expressions must be resolved in favor of the Indians; and, are to be construed as the Indians would have understood them. *See Winters*, 207 U.S. at 576-77; *see also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); Apache Treaty, Article 11 (Apache Tribe App. 297a). These important cannons of construction have been specifically applied to interpretations of the *Globe Equity Decree. See, e.g., United States v. Gila Valley Irrigation District*, 31 F.3d 1428, 1438 (9th Cir. 1994).

against the City of Lodi, arising out of the **same** alleged circumstances of environmental contamination, Randtron (unlike the City of Lodi) had failed to preserve its claims in the consent decree, and therefore it was precluded by *res judicata* from asserting its claim for contribution against Lodi in the subsequent action.

The *Randtron* ruling has little to no application the Arizona Supreme Court's decision that neither the Apache Tribe nor the United States on the Tribe's behalf are precluded by the *Globe Equity Decree* from claiming federal reserved, aboriginal or other water rights claims to the tributaries of the Gila River.

First, the tributaries and mainstream do not comprise the same "claim" (unlike Lodi's claim for environmental contamination) and they are not part of the same transactional nucleus of facts as the United States' claims to the mainstream. Second, the tributaries were expressly excluded from the scope of the Amended Complaint (which was the legal and practical norm in Arizona water adjudications at the time). Third, the exclusion of the tributaries from the geographic scope of the Amended Complaint was expressly confirmed in the *Globe Equity Decree*. Finally, even if the tributaries were part of the same "claim" as the mainstream rights (which they were not), the parties expressly agreed in the *Decree* to the exclusion of all claims to the tributaries, and dismissed such claims without prejudice as to all parties to the *Decree* (including the United States for the Apache Tribe) to bring such claims in the future. *Randtron* simply does not apply.[55]

D. Principles of "Finality" Are Not Defeated By the Arizona Supreme Court's Ruling On the Tributaries

In what can only be viewed as a "last ditch effort" to convince the Court to grant its Cross-Petition, Phelps Dodge predicts a virtual doomsday situation in Arizona if the Apache

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[55]The *Globe Equity Decree* must be construed as a contract. *See Moore's Federal Practice*, Volume 18, § 131.30 (3)(c)(iv).

Tribe and the United States as its trustee are allowed to adjudicate claims to the tributaries of the Gila River for the Apache Reservation, imploring that principles of finality of judicial determinations will be upset, much of the Arizona economy will be disrupted, and persons whom have relied on the *Globe Equity Decree* will be deprived of their "investment-backed expectations."[56]

Phelps Dodge merely reiterates here the long litany of arguments that non-Indians have always leveled against Indian Tribes when they strive to develop the resources of their Reservations and to realize some measure of prosperity for their people now and in the future. These arguments were wrong then, and they are wrong now.[57]

The Apache Tribe has already explained that principles of "finality" will not be upset if the Tribe is able to assert its rightful claims to the tributaries of its Reservation. The *Globe Equity Decree* did not include the tributaries (as Phelps Dodge acknowledged in its original Stipulation of Dismissal from *Globe Equity*), and there is nothing in the history of the *Globe Equity* litigation that bars the United States and the Tribe from proving its claims to the tributaries now in Arizona's stream

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[56]P.C. Cross-Petition at 29.

[57]The Arizona Supreme Court confronted similar claims of harm to Arizona's interests when it applied principles of federal reserved water rights to the groundwater underlying Indian reservations in Arizona. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 750-751 (1999). While the Arizona Supreme Court recognized that the federal reserved water rights doctrine "threatens to disrupt the assumptions that underlie state law uses" and to impose a "burden" in the accommodation of such rights, particularly as to agricultural, industrial, mining and urban interests, the Court nevertheless observed that these non-Indian interests have long understood, "sometimes noted, sometimes wished away" the looming need to adjudicate the federal reserved water rights for Indian Reservations in Arizona, and these interests should not now be surprised that the time of accommodating these interests may have arrived. *Id.* Nothing less can be said for the Apache Tribe's claims on the tributaries.

adjudication. Moreover, any reliance that non-Indian interests may have placed upon the *Globe Equity Decree* in their development of "investment-backed expectations" *vis-a-vis* the tributaries would plainly have been unjustified and misplaced, as the *Decree* does not adjudicate a single right to the tributaries in its Schedule of Rights and Priorities.[58] Indeed, Phelps Dodge and others on the tributaries have known since their dismissal from *Globe Equity* that all rights to the tributaries would eventually be adjudicated.[59]

Phelps Dodge also offers nothing in support of its suggestion that "much" of Arizona's economy will be disrupted if the Tribe is able to finally realize its claims to the tributaries flowing on and to its Reservation, nor could it. How long has the life of the Apache People been disrupted? How long have the Apaches been impoverished and unable to realize their hopes and dreams of prosperity, while they watch the precious waters of the tributaries diverted by non-Indians interests like Phelps Dodge and other off Reservation interests? The Tribe is entitled to have its water rights to the tributaries of the Gila River adjudicated in Arizona's stream adjudication.

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[58]*See* Article V (Supp. App. 12-197).

[59]The Arizona Supreme Court has also recognized that the adjudication of all rights "*inter se se*" in the State will result in a "gallon for gallon" reduction of water use by some, for all the waters in the Gila River have been put to use. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 81 (2001); *see also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d at 750-751. This Court recognized in *Arizona v. San Carlos*, 463 U.S. at 551, the need for a comprehensive adjudication of water rights, including for Indian Tribe's, given their "ubiquitous nature."

IV. CONCLUSION

Phelps Dodge has failed to present an issue which warrants this Court's consideration or review. Its Conditional Cross-Petition should be denied.

Respectfully submitted,

JOE P. SPARKS
Counsel of Record
SUSAN B. MONTGOMERY
ROBYN L. INTERPRETER
SPARKS, TEHAN & RYLEY, P.C.
7503 First Street
Scottsdale, AZ 85251
(480) 949-1339

Attorneys for Cross-Respondents